

file

BEFORE THE  
STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of the Denial of Water )	
Quality Certification for Lee Fletcher )	
to Place Fill in a Wetland, Village of )	Case No. 3-NC-94-2042
Port Edwards, Wood County, Wisconsin )	

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on April 3, 1995, at Wisconsin Rapids, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge, presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Lee Fletcher  
1570 4th Street  
Port Edwards, Wisconsin 54469-1019

Wisconsin Department of Natural Resources, by

Michael Cain, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

Village of Port Edwards, by

Walter G. Wefel, Jr., Attorney  
440 Meadow Lane  
Wisconsin Rapids, Wisconsin 54494

Rolland Aubey, President  
1561 4th Street  
Port Edwards, Wisconsin 54469

### FINDINGS OF FACT

1. On or about August 17, 1994, Lee Fletcher (Fletcher or the applicant), 1570 4th Street, Port Edwards, Wisconsin, 54469, completed filing an application with the Department for water quality certification. The application requested water certification relating to a project to place fill in 100 feet by 85 feet of wetlands for residential development in the Village of Port Edwards, Wood County, Wisconsin.

2. On October 3, 1994, the North Central District, Department of Natural Resources reviewed and denied the application of Lee Fletcher.

3. On January 18, 1995, the Department received a request for a contested case hearing from Mr. Fletcher. On March 17, 1995, the Department forwarded the file to the Division of Hearings and Appeals for hearing.

4. The applicant owns real property located in the NE 1/4 of the SE 1/4 of Section 35, Township 22 North, Range 5 East, Wood County, Wisconsin.

5. The above-described property is a small, 145 feet by 145 feet, subdivided lot in the Village of Port Edwards. The property is zoned residential and is surrounded on both sides by single-family dwellings. The lot is in a developed part of the Village that is the 8th addition. This addition is served with water, sanitary sewer and storm sewer. The proposed fill area is 100 feet by 85 feet to a depth of approximately 3 feet. The lot did not appear on the Wisconsin Wetland Inventory Maps at the time of Mr. Fletcher's water quality certification application.

6. The DNR Area Water Management Specialist, Pete Wolter, presented undisputed expert testimony that the project site is a wetland. The lot contains mostly hydrophytic vegetation and hydric soils. Wetland plant species noted include: reed canary grass, lake sedge, broad leaved cattail, arrowhead, trembling aspen and others. Water is at or above the surface level during much of the year.

Wolter testified that the lot met all three criterion involved in the determination of a wetland: hydrology, hydric soils and hydrophytic vegetation. The applicant and the Town do not dispute that the lot area in question is a wetland within the meaning of legal definitions.

7. The applicant's purpose in filling the wetland area is to allow him to move a private rental residence to the project site, including the area of the fill. The parties agreed at hearing that without the fill area there is not sufficient upland area to support a single-family dwelling at the site. The "proposed activity" of filling to support development of a residence at the site is not "wetland dependent".

8. A practicable alternative to fill of the wetland area exists in that the residence could be located at a different, upland site. Mr. Fletcher did not carry his burden of proof in demonstrating that there were no other lots available for the purpose of relocating the rental dwelling unit.

9. Wolter presented undisputed expert testimony that filling the area would have a significant adverse impact to wetland functional values. Specifically, filling in the area would interfere with the flood and storm-water absorption and storage and water quality protection functions of the wetland. Wolter rated the significance of these two functions at the site as "high". (See Exhibit 48). The wetland area improves water quality by absorbing and filtering nutrients and sediments. Further, filling in the area would result in a loss of floral diversity in both filled and non-filled wetland areas of the lot. Finally, Wolter presented undisputed expert testimony that filling in the area would result in a loss of and destruction of wildlife habitat, especially to waterfowl and other birds, reptiles, amphibians and small mammals. The DNR properly considered the cumulative impacts of filling other such lots across the state as well as the localized impact of filling the lot in question. Wolter testified that he had received numerous similar requests to fill wetlands in the four county area he serves.

The applicant has not carried his burden of proof in demonstrating that filling in the area would not result in significant adverse impacts to wetland functional values. A clear preponderance of the evidence, including all of the expert testimony, indicates that the small isolated lot represents a functioning wetland system and that filling of the area in question would significantly harm wetland functional values. Further, significant cumulative detrimental impacts to wetland functional values would result from approval of this and similar projects across the state.

## DISCUSSION

The Village made an excellent case as to why a variance from the legal standards relating to the fill of wetlands should be granted. The lot is isolated, small, in a subdivided area serviced by water and sewer facilities. However, there is no legal authority for the ALJ to grant such a "variance". Administrative agencies have only such powers as are expressly granted to them or necessarily implied and any powers sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co.

v. State Board of Health, 245 Wis. 440 (1944) Accordingly, arguments relating to whether such lots should be subject to wetland preservation water quality standards should be addressed to the legislature and not the ALJ.

The existing Wisconsin law does not assess wetlands on the basis of size, but rather on the basis of the functions of a wetland system. On this record, there is no factual basis on which to dispute the DNR's expert judgment that this tiny patch of wetland has significant functions which filling would damage. The DNR is charged with protecting the public waters and must consider the cumulative impacts of numerous such fills across the state. The Wisconsin Supreme Court has stated as follows: "A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential may lead to another, and another, and before long a great body of water may water may be eaten away until it may no longer exist." Hixon v. Public Service Commission, 32 Wis.2d 608, 631-32 (1966)

#### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats., and NR 103.08 and NR 299.05(6), Wis. Adm. Code.
2. The Department of Natural Resources has the authority pursuant to sec. 144.025, Stats., and NR 299 and NR 103, Wis. Adm. Code, to review proposals for the discharge of dredge and fill material to wetlands pursuant to secs. 401 and 404 of the Clean Water Act. The area of the proposed fill is a wetland within the meaning of NR 103.02(5) in that water is at, near or above the land surface long enough to be capable of supporting hydrophytic vegetation and soils indicative of wet conditions.
3. The proposed project is not wetland dependent within the meaning of NR 103.07(2) in that moving of the rental dwelling unit is not an activity of such a nature that requires location in or adjacent to wetlands to fulfill its basic purpose.
4. The applicant has not carried his burden of showing that no practical alternatives to filling the portion of the lot in question are available to fulfill his project purpose of relocating the rental dwelling in question. NR 103.07(2) and NR 103.08(3)(b).
5. The proposed project would result in violation of the standards contained in NR 103.08(3) and NR 299.04, Wis. Adm. Code in that significant adverse impacts to wetland functional values would occur within the meaning of NR 103.08(04).

6. The Department has the authority pursuant to NR 299.05 and NR 103.08, Wis. Adm. Code, to deny water quality certification if it determines that there is not reasonable assurance that the project will comply with the standards enumerated in NR 299.04 and NR 103.08(03), Wis. Adm. Code. These standards include consideration of cumulative impacts pursuant to NR 103.08(03)(d).

ORDER

THEREFORE, IT IS HEREBY ORDERED, that the DENIAL of water quality certification of the application for a permit to discharge fill to a wetland on property owned by Mr. Lee Fletcher located in the NE 1/4 of the SE 1/4 of Section 35, Township 22 North, Range 5 East, Wood County, is AFFIRMED, and the petition for review, DISMISSED.

Dated at Madison, Wisconsin on April 27, 1995.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By



JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.